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No. 92-487

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,

Petitioners,

vs.

ROY and KATHLEEN R. ROBINSON, individually and as partners d/b/a COMPUTER SLIDE COMPANY, and that class of persons and entities similarly situated,

Respondents.

THE CITY OF SEATTLE, HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN and JOHN DOE RYAN,

Petitioners,

vs.

SINTRA, INC., KEITH H. HAMACK and PATTI I. HAMACK, ARTHUR M. STANLEY and SUSAN S. STANLEY,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

MOTION OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS AND THE NATIONAL ASSOCIATION OF COUNTIES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE SUPPORTING PETITIONERS

ROBERT H. FREILICH
(Counsel of Record)
RICHARD G. CARLISLE
NEIL R. SHORTLIDGE
TERRY D. MORGAN
FREILICH, LEITNER, CARLISLE & SHORTLIDGE

1000 Plaza West
4600 Madison
Kansas City, MO 64112
Telephone: (816) 561-4414
Facsimile: (816) 561-7931

Counsel for National League of Cities, U.S. Conference of Mayors and National Association of Counties

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The National League of Cities, the U.S. Conference of Mayors and the National Association of Counties respectfully seek leave of this Court to file a brief as amici curiae in support of the Petitioners, and as grounds therefore would state:

1. The National League of Cities is an organization consisting of cities and towns from all areas of the United States.

2. The U.S. Conference of Mayors is an organization consisting of the mayors of cities from all areas of the United States.

3. The National Association of Counties is an organization consisting of counties from all areas of the United States.

4. Pursuant to Supreme Court Rule 37, the movants have obtained permission to file as amici from the Petitioners in this case. The Respondents have refused consent to the filing of the brief of amici curiae.

5. The questions presented to this Court affect the interests of all municipalities and counties in the country.

6. Movants wish to present this Court with additional authorities and arguments with respect to only the first question presented by the Petitioners (substantive due process) and to demonstrate that the resolution of the issue will affect cities and counties outside the State of Washington. Although movants also believe that the qualified immunity issues raised in the third question presented are of grave concern, those issues are adequately addressed by the Petitioners.

WHEREFORE, the National League of Cities, U.S. Conference of Mayors and National Association of Counties

respectfully request leave to file a brief as amici curiae in support of the Petitioners.

Respectfully submitted,

ROBERT H. FREILICH
(Counsel of Record)
RICHARD G. CARLISLE
NEIL R. SHORTLIDGE
TERRY D. MORGAN
FREILICH, LEITNER, CARLISLE & SHORTLIDGE
1000 Plaza West
4600 Madison
Kansas City, MO 64112
Telephone: (816) 561-4414
Facsimile: (816) 561-7931

Counsel for National League of Cities, U.S. Conference of Mayors and National Association of Counties

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT..... 2

ARGUMENT 3

A. Violations of State Law Do Not Constitute a Substantive Due Process Violation 3

B. There Can be No Substantive Due Process Violation Where the Legislation Substantially Advances Legitimate State Interests 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

Collins v. City of Harker Heights, ___ U.S. ___, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992) 6, 8, 10

Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988) 6

Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952) 7

Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) 8

Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) 5

PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir. 1991), *cert. granted*, ___ U.S. ___, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991), *cert dismissed as improvidently granted*, ___ U.S. ___, 112 S. Ct. 1151, 117 L. Ed. 2d 400 (1992) 6

Presbytery of Seattle v. King County, 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, ___ U.S. ___, 111 S. Ct. 284, 112 L. Ed. 2d 238 (1990) 3, 4, 5, 6

Robinson v. City of Seattle, 830 P.2d 318 (Wash. 1992) 3, 4, 5

Screws v. United States, 321 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945) 5

Sintra, Inc. v. City of Seattle, 829 P.2d 765 (Wash. 1992) 3, 4, 5

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955) 7

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

U.S. Const:

Amend. V 3

Amend. XIV 2, 3, 5, 6, 9

STATUTES AND REGULATIONS:

42 U.S.C. § 1983 2

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS AND THE NATIONAL ASSOCIATION OF COUNTIES AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

Amici are organizations whose members include county and municipal governments and officials throughout the United States. Amici and their members have a vital interest in legal issues that affect the powers and responsibilities of local government to adopt and enforce land use and housing legislation in the public interest. These cases are of critical importance to every local government, since they vastly expand grounds of liability under 42 U.S.C. § 1983. Moreover, there is no reason to believe that the Washington Supreme Court's substantive due process analysis could be limited to land use or housing cases; rather, it would apply equally to all types of regulations at the state and local level.

SUMMARY OF THE ARGUMENT

The Washington Supreme Court has altered the federal law of substantive due process, ignoring all United States Supreme Court precedents, thereby allowing recovery of monetary judgments under Section 1983 on grounds that have never been recognized by this Court. These cases will serve as precedents, not only in the State of Washington, but in other jurisdictions, for each state court to expand or alter the factors used in federal substantive due process analysis under the Fourteenth Amendment of the United States Constitution. The inevitable result will be a patchwork quilt of decisions – some following the separation of powers doctrine and showing deference for state and local legislation, others employing, as here, unprecedented scrutiny in violation of that doctrine.

ARGUMENT

A. Violations of State Law Do Not Constitute a Substantive Due Process Violation.

As set forth in more detail in the petition for a writ of certiorari filed by petitioners, at issue in this case are the provisions of two versions of the City of Seattle's Housing Preservation Ordinance (collectively referred to as "HPO") pertaining to housing replacement and tenant relocation. The stated purpose of the HPO "was to mitigate the loss of low income housing in the city caused by demolition for development and to reduce the hardships experienced by displaced tenants." *Robinson v. City of Seattle*, 830 P.2d 318, 324 (Wash. 1992). The Washington Supreme Court concluded that the HPO violated substantive due process guarantees of the Fourteenth Amendment to the United States Constitution, both on its face (*Robinson*) and as applied to particular property owners (*Sintra, Inc. v. City of Seattle*, 829 P.2d 765 (Wash. 1992)). The HPO also was challenged, unsuccessfully, on the basis that it constituted a taking of property without just compensation in violation of the Fifth Amendment as applied to the states by the Fourteenth Amendment.

In addressing the federal substantive due process issue, the Washington Supreme Court applied a three-prong test set forth in *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, ___ U.S. ___, 111 S. Ct. 284, 112 L. Ed. 2d 238 (1990) which inquires: "(1) whether the regulation aims to achieve a legitimate public purpose, (2) whether the means adopted are reasonably necessary to achieve that purpose, and (3) whether the regulation is unduly oppressive on the property owner." *Id.*, 830 P.2d at 329; *Sintra*, 829 P.2d at 776. The Washington Supreme

Court noted that prior decisions of that court had invalidated the housing replacement provisions and tenant relocation provisions only under state law, but that those decisions did not address federal constitutional issues. *See Robinson*, 830 P.2d at 325-326.

In both cases, the Washington Supreme Court found that the preservation of low income housing units was a legitimate public purpose, and, therefore, the first prong of the *Presbytery* test had been satisfied. In *Robinson* (involving the facial challenge), the court also found that the means used in the ordinance were reasonably necessary to achieve that purpose, and therefore the second prong had been satisfied. In *Sintra* (involving an "as applied" challenge), the court stated that it need not decide whether the second prong had been satisfied due to its finding on the third prong.

In both cases, the court found that the HPO was "unduly oppressive" and therefore violated substantive due process under the third prong of the *Presbytery* analysis. In determining whether a regulation is unduly oppressive, the *Presbytery* court had suggested certain nonexclusive factors to be considered in balancing the interests of the public against those of the regulated landowner:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary

> or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Robinson, 830 P.2d at 331 (quoting *Presbytery*); *Sintra*, 829 P.2d at 776-777 (quoting *Presbytery*). Consideration of these criteria led the court to its conclusion that the HPO violated substantive due process guarantees under the Fourteenth Amendment.

The Washington Supreme Court's conclusion in the *Sintra* case that the application of the HPO violated federal substantive due process appears to be influenced by the City's conduct of enforcing the HPO after portions thereof had been ruled invalid by a trial court under state law. However, this Court has long recognized that mere violations of state or local law seldom rise to the level of constitutional violations. *See Screws v. United States*, 321 U.S. 91, 108, 65 S. Ct. 1031, 1039, 89 L.Ed. 1495, 1506 (1945). Thus, in *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), the Court held:

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

424 U. S. at 698-699, 96 S. Ct. at 1159, 47 L. Ed. 2d at 412. *See also, Collins v. City of Harker Heights,* ___ U.S. ___, 112 S. Ct. 1061, 1070-1071, 117 L. Ed. 2d 261, 275-276 (1992); *PFZ Properties, Inc. v. Rodriguez,* 928 F.2d 28, 32 (1st Cir. 1991), *cert. granted,* ___ U.S. ___, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991), *cert dismissed as improvidently granted,* ___ U.S. ___, 112 S. Ct. 1151, 117 L. Ed. 2d 400 (1992) ("[A]llegations that . . . officials failed to comply with agency regulations or practices in the review and approval process . . . are not sufficient to support a substantive due process claim under the Fourteenth Amendment to the United States Constitution"); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988) ("Something more is necessary than dissatisfaction with the rejection of a site plan to turn a zoning case into a federal case; and it should go without saying that the something more cannot be merely a violation of state (or local) law").

B. There Can be No Substantive Due Process Violation Where the Legislation Substantially Advances Legitimate State Interests.

In applying the three-prong test of *Presbytery* – a test established under Washington law – the Washington Supreme Court grafted its own constitutional analysis onto the Fourteenth Amendment. In the process, the court ignored controlling federal precedent.

The three-prong test of *Presbytery* has never been articulated by this Court for purposes of federal substantive due process analysis. To the contrary, this court has traditionally been highly deferential to the legislative

decisions made by state and local governments in the area of social and economic legislation. In *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955), the Court considered a due process challenge to an Oklahoma law which made it unlawful for anyone other than a licensed optometrist or ophthalmologist to fit eyeglass lenses or to replace lenses in frames. The Court observed that the law "may exact a needless, wasteful requirement in many cases," but that judgment was one for the legislature. 348 U.S. at 487; 75 S. Ct. at 464; 99 L. Ed. at 571. Adding that "the law need not be in every respect logically consistent with its aims," the Court stated the constitutional test to be that "it is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." 348 U.S. at 487-488; 75 S. Ct. at 464; 99 L. Ed. at 572. The use of criteria such as the loss of value to the property owner has been expressly rejected by this Court for substantive due process purposes. *See Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424, 72 S. Ct. 405, 407, 96 L. Ed. 469, 473 (1952).

During the last term, the Court held that only government acts or omissions which could be properly characterized as "conscience-shocking" constituted violations of substantive due process. Once again, the court's comments suggested a separation of powers underpinning for this constitutional analysis:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area

> are scarce and open-ended. [Citation omitted] The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins, supra, ___ U.S. at ___, 112 S. Ct. at 1068, 117 L. Ed. 2d at 273.

Applying the proper federal standards, the Washington Supreme Court should have found that the HPO comported with substantive due process requirements. Indeed, it is ironic that the court found the HPO to violate substantive due process while at the same time finding that the ordinance substantially advanced legitimate state interests for purposes of the takings analysis. In *Robinson,* the court found that "the housing replacement and tenant assistance provisions were substantially related to preserving low income housing and assisting tenants experiencing relocation hardships," and thus "the ordinance did advance legitimate state interests in the general welfare of the citizens of Seattle in attempting to preserve rental housing stock and assist low income tenants, and therefore was not a per se taking." 830 P.2d at 330.

The court's conclusions are ironic because substantive due process analysis should be more, not less, deferential to legislative judgment than takings analysis. This point was recognized in *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), where the Court noted that the takings analysis involved a more exacting scrutiny than substantive due process or equal protection analysis:

> . . . Our opinions do not establish that these standards are the same as those applied to due

> process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, [citation omitted] not that "the State 'could rationally have decided' the measure adopted might achieve the state's objective." [Citation omitted]

483 U.S. at 834-835 n.3, 107 S. Ct. at 3147 n.3, 97 L. Ed. 2d at 688 n.3. Having concluded that the HPO "substantially advanced a legitimate governmental interest" for purposes of takings analysis under this more exacting standard, how could the court then conclude that the HPO does not comply with the lenient substantive due process standard that the ordinance be rationally related to a legitimate governmental interest?

CONCLUSION

The Washington Supreme Court having applied the wrong standard for reviewing the constitutionality of the HPO on substantive due process grounds, the petition for certiorari should be granted and the decision of that court should be reversed and a judgment entered finding that the HPO satisfies the requirements of the Due Process Clause of the Fourteenth Amendment. Alternatively, the Court should exercise its supervisory authority to vacate the judgments and remand the cases back to the Washington Supreme Court for reconsideration of the substantive

due process issue under *Collins* and other Supreme Court precedent.

Respectfully submitted,

ROBERT H. FREILICH
(Counsel of Record)
RICHARD G. CARLISLE
NEIL R. SHORTLIDGE
TERRY D. MORGAN
FREILICH, LEITNER, CARLISLE & SHORTLIDGE
1000 Plaza West
4600 Madison
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